

\pp\abrams
June 16, 1996

Comments on: Floyd Abrams, The Pentagon Papers a Decade Later, NYT Magazine June 1981 (can't find a date on it!)

What is the attitude of the NYT, Floyd Abrams, Rosenthal, Sheehan, MHH, on the question, not whether publication of the Papers met the standards for prior restraint, but whether they constituted: a) a crime; and specifically, (b) a violation of the Espionage Act, 18-793, as asserted in the telex by Mitchell on Monday, June 14, 1971?

How vulnerable did they feel to the grand jury meeting in Boston to consider the distribution?

Did they recognize that the charge against Tony Russo-- unauthorized possession of copies of documents relating to the national security...--applied directly to all of them, from journalists to editors to secretaries?

Thus, if Tony had been convicted, and this had been upheld, they would have been eminently convictable?

Had they done legal work on their criminal liability? Did my lawyers ever see any of their legal work? E.g., did they assist Neal Sheehan in his relations to the grand jury?

Aside from possession, was publication of the Papers a criminal violation or not?

Did they think I had committed a crime? Had they reached a firm conclusion on ;this or not? If they felt my conviction would have been unjust--and a precedent that would directly affect their news-gathering (just as conviction of Tony Russo would directly affect their own criminal liability), did they recognize an interest in supporting my defense, seeing that justice was served?

E.g., by sharing legal briefs, by providing legal services and perhaps other srvices, by encouraging others to support my case (not in their news columns, but by efforts of individuals and perhaps the Corporation and legal department)--including financially?

Would it have been improper for them to encourage contributions to my defense fund? Or even, to make direct contributions? (as presumably they would for Sheehan and Smith. Would they, or would they not, have helped the Washington Post, if somehow it had been criminally prosecuted, and they had not? Or if both were prosecuted: would they not have collaborated? Would they not have sought support from Newspaper associations, even readers?

What is their understanding as to why they were not criminally prosecuted? According to Mardian, a number of the justices thought they should have been, along with believing--as did Bickel?--that I should have been.

How many journalists believed I was guilty of a crime? How many of these felt confident that the Times and Post--and others!--were not?

My guess is that they have given little or no thought to any of these questions over the years, certainly since my case was dropped. And my guess as to the reasons: 1) there had no other case (and never has been since except Morrison; how active did they get on that? My impression is that they ignored his defense at the district court level, foolishly, but did get involved at the appellate level (to no effect?); there was no precedent, they had not addressed it earlier, and they never got around to it;

2) they were unsympathetic to me anyway, because of my revealing myself (which they misunderstood), my giving the Papers to the Post and other papers, my antiwar activism, and even my decision to give out the Papers, to them! ("a traitor" as Danny Sheehan says one of the Times' lawyers said afterwards: "It's one thing to represent the New York Times, another to represent a traitor.")

3) They are not all that concerned about defending the First Amendment (or, what is part of the same thing, challenging the secrecy system), and have never bothered to think through what is required to do that. They recognized only the most immediate threat to it, and to them directly, the attempt at prior restraint. My trial they did not perceive as involving them, despite the charges against Russo.

The NYT and Post, and the newspapers or media in general, have never examined the Constitutional and democratic and policy challenges raised by the functioning of the actually-existing secrecy system and the lying it makes possible and protects.

I would say that system caused 58,000 American deaths, and millions of VNese deaths, in Vietnam alone. Our involvement would probably not have been possible with full public awareness of the information in the PP and still more, the advice and judgments that were not written down or did not make it into the PP because they were still more secret. (And officials were not questioned under oath, and when they were, never afterwards punished when they were found to have perjured themselves). And it thwarted the functioning of democracy: in connection with the Tonkin Gulf Resolution, the elections of 1964, 1968 and 1972, the whole budget process and the war powers of Congress, and the implication of the

nation in crimes against the peace, the waging of aggressive war.

Is it the case that in weighing the decision to allow prior restraint, a balancing is permitted and invoked between the harm that might be done by publication and the harm that might be done by preventing publication and by continued public ignorance of the information in question?

That is not, is it, a consideration in the criminal trials, or the Espionage Act provisions as they are written. I could not argue this in my trial (a fatal limitation when it came to using y trial for public education, though not fatal to waging my defense, given the very thin argument that any harm at all had been done by publication).

(Thus, we could argue truthfully, and had to do so, that an enemy intelligence agent would have already known much of the data alleged to be very sensitive by the government, for the same reason that Noam Chomsky would have known it. (There was much that neither they nor the public would have known, but this was not material that the government choose to bring up against me. They could have argued that these other items would also be useful to an enemy, or even more useful than the items they cited, but they would have been focussing attention on government lies which would have been self-evidently helpful for the US public to know, even if that meant informing the enemy at the same time. After all, every governmental hearing and every Presidential speech, especially every investigative report, has information that the enemy would like to know, much of it previously withheld, secret (precisely to keep it from the public), but this is outweighed by the value of its publication to the US public).

But the Executive branch had always previously shrunk from a Consitutional test before the Supreme Court of the Constitutionality of these statutes interpreted in this way, literally, in terms of vagueness and over-breadth.

(A genuine risk posed by my action was that it would provoke the government to take the gamble of taking this to the Supreme Court and that the government might win, definitely making secrecy matters worse. This did not happen: till the Morrison case, still not confirmed at the S>C>

What if there had been no prior restraint attempt, but only criminal prosecution of me? Say, on narrow theft grounds. Would the NYT have helped me? (No, they didn't anyway). But what would have followed then for the Times? How did they see the implications of the Boston Grand Jury?

Abrams: "Supporters of the war, ranging from Ronald Reagan to Jimmy Carter, were harsh in their criticism of The Times." (ref?) p.22

"Former Secretary of State Cyrus R. Vance, for one, believes publication ultimately shortened the conflict."

"Some of the impact has been totally unpredictable--the unlikely trail of events, for instance, that led from publication of the Papers to the creation of the Nixon Administration's "plumbers" to plug news leaks to the ultimate fall of the Administration itself."
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[Ask Hatfield, McGovern, Mathias...Mhh..am I right in believing that a) publication gave a boost, and continuing thrust, to the accumulation of votes for McGovern-Hatfield in 1971 and later; b) the Watergate struggle, particularly refusal to allow Dean to testify, was critical to getting a majority of votes in 1973 to cut off funding for the bombing and combat operations, first in Cambodia and then in Indochina?

(Or--would this have followed anyway once the troops were out in March? How would Congress have reacted if Nixon had restarted bombing in SVN in April 15 or so, 1973? Would they ever have cut off the funding? Didn't it make it easier to do this when there was no bombing going on? What if the plumbers had never been exposed?)

"None of the dire consequences of publication foreseen by the Government came to pass." (or as Griswold put it, no damage to national security occurred at all). "The disclosure signaled the end of an era of press-Government collaboration."

(It's necessary to define this as it existed pre-PP and how it changed thereafter. After all, there wasn't total collaboration and press credulity before that: see Sheehan, Halberstam, Browne, Arnett...Was it more a matter of editorial and publisher credulity and collaboration?

(PDS thinks it almost certain that Rosenthal, who he believes had intelligence connections going back to his time in Poland (along with various Times' officials who were virtually agents) must have checked the acceptability of publishing the papers with CIA before his decision! I doubt this. However, if he did, I could believe that they would have okayed it!)

June 16, Sunday, 1996:

[In talking to Chau today, I made the point that I saw the US role in Vietnam as essentially the same as that of the French, the Japanese, the Chinese. (He said, "Of course").

Talking to Chau, I was thinking of an aspect that I'm not sure I have reflected on before, certainly not when I was there: that the US was seen by all Vietnamese as a country that had aided, indeed provide the mainstay of, the French attempt to conquer their former colony from 1945-46-54. That could only fatally compromise the claims of the US to support "nationalism" and independence in Vietnam, South Vietnam or Vietnam, and the nationalistic claims of any Vietnamese who worked for or with the US. (We thought of ourselves as anti-colonial--without ever reconsidering that in the light of our support of the French--and it never occurred to us that our behavior would have fatally undermined that impression in the eyes of the Vietnamese and everyone else, however we might have been seen before 1945! (It was in 1945 that Ho Chi Minh himself adopted the terms of the US Declaration of Independence, partly in hopes of winning US support against the French or at least US neutrality, neither achieved!) I.e., we continued to see ourselves, and to imagine that others saw us, as might have been appropriate (and indeed was the case for Ho Chi Minh!) before, but not after, our eight-year support for the French and even pressure on them to pursue their/our war, which we had in effect made our own, an allied effort.

Even if the post-1954 policy were seen by us as having different (anti-Communist, pro-democracy) motives, and as being waged without the albatross of alliance with the French, we ignored that we ourselves had been tainted with the French brush in the previous eight years, a taint hardly to be overcome.

Chau made the point in particular that although Diem himself was both anti-Communist and nationalist, the US encouraged him to keep in place the entire government apparatus that had served the French in their fight against Vietnamese independence, and even persisted in referring to these collaborators as "nationalists" and "patriots," whereas the nationalists, Communist or not, had all fought or at least opposed the French. This was fatal to efforts at "national-building" or "pacification."

I made the point to him that all USG (and GVN) discussions of national-building and pacification at the time had ignored the question of whether or not this effort was being shaped, dominated, directed by foreigners and those employed by or working with foreigners.

Pacification concepts, in particular, had evolved almost entirely in the context of French and other projects of colonialist domination. That is why they ignored this distinction; it didn't even exist for the originators of the concepts.

Our discussions ignored this history, and proceeded as if the concepts and practices were directly suited to the "consolidation of governmental authority over regions infected by bandits, or subject to "indirect aggression" from outside the borders, or

"subversion, rebellion, insurgency." Are any of the latter terms appropriate to resistance to foreign occupation or foreign domination? Counterinsurgency might better have been described as Repression-of-The-Resistance (to occupation, invasion, domination by foreigners).

We theorized and acted as if we were not foreigners in Vietnam; and to compound the irony, we acted and thought as if "North Vietnamese" were foreigners in "South Vietnam," and indeed as if Communists were foreigners in either part. (Vietnamese could be described as foreigners in Cambodia and Laos, and as violating their sovereignty by their operations and influence: but so were we!)

Even on the false assumption that there were, in nationalist terms, two countries, we are this week addressing the fact that JFK was inserting over a thousand Vietnamese into North Vietnam as early as his first month in office in 1961.

Chau says, from his experience in his own family, that many non-Communist nationalists joined the Communist leadership and cause, from 1946 on, only because the US was supporting the French, and it therefore seemed necessary to have the support of the Chinese and Soviets on the basis of Communist leadership. If the US had simply refrained from supporting the French, he believes that many--he himself, and perhaps his brothers, especially by 1950--would have rallied to other nationalist leadership against the French, rather than ally with the Communists. In 1945, he says, out of a million Vietnamese there were perhaps 50 to 100 Communists. It was US support of France that threw the weight of anti-French nationalism behind the Communists! (I commented that this was a totally unfamiliar assertion to me, and very interesting).

Much has been written about duplicity in connection with the Tonkin Gulf incidents: though it is worth noting that McNamara is still lying about these not only last year but to this day, in describing the 34A Marops as involving "Vietnamese" patrol boats. (The second North Vietnamese patrol boat attack on US vessels was imaginery; and perhaps even the first was not an attack. But the US patrol boat attacks on North Vietnam that same week were not imaginery, though Mcnamara is still concealing them.

24: Abrams: after the study was delivered to Clifford in Jan. 15, 1969, "it was filed away, and the war continued to drag on--a circumstances that one of the study's authors, Daniel Ellsberg, soon came to consider intolerable."

[I did begin to see continuation as wrong, for the first time, in June 1969, for reasons Abrams doesn't know. But I don't believe

MI would have thought of releasing the PP in the spring of 1969--when I was writing my draft RDS for RAND--or even after June 1969, till August and September. Reading the early volumes revealed to me, in September (?) that the war had been illegitimate from the start (as well as probably doomed from the start: in both respects, like the French effort (how about the Japanese?!)). But even that would probably not have triggered my release.

The key impulse to my action was not that the war was "dragging on" (as everyone could see, and as is the dominant perception of it to this day: see Stone's Nixon) but (on the basis of inside information) that it was likely to reescalate, unless Nixon's secret policy were changed.

The dominant public perception is that the war steadily wound down after 1968, though surprisingly and disappointingly slowly. This was true for US ground troops. It was a triumph of opinion management by HAK and the Nixon Administration that this was, and remains, the dominant impression, i.e. that this was equated to the winding down of the "war," or at least of "US combat involvement," when the opposite was true of US bombing, along with US invasion of Cambodia (treated as an aberration) and US-supported invasion of Laos.

It is as if our public and history accepted the notion that there was no US combat involvement in Indochina at all if there had been no deployment of US combat units: only US bombing of South and North Vietnam, Cambodia and Laos. (That is exactly the situation Nixon sought to achieve, slowly, after 1969, and was on the verge of enacting in April 1973: prevented by Dean's revelations about the plumbers! (Whether he could have maintained this or not--especially, without Watergate at all--and how long he could have deterred an offensive and hung on to Saigon: these are important, open questions)).

Many writers find it difficult to get straight when I was a "consultant" rather than an employee or official. Abrams: "As a consultant at the Rand Corporation, DE had access" (maybe this is OK: a consultant to the DOD and WH; though my access was not then based on my being a consultant but on being a researcher at RAND, an employee).

Earlier 25: "A former marine, then a consultant in the Departments of Defense and State"...in the period he is describing, when I was a supporter of a US role in VN, I was an official.

Then he says that "starting in 1969, he tried to interest Congressional committees in subpoenaing the study. All such efforts failing..." I didn't suggest subpoena, nor even request: the latter was Fulbright's idea. I gave the study to Fulbright, just as I did to the Times; likewise I offered it to McGovern (did

I give it or not, to Holum? I think I did!) And to Mathias, to whom I gave NSSM-1: and also the PP? and to McCloskey.

Gurfein had been in OSS! Gravel in Counterintelligence. List the number of people in the judiciary and the newspapers with intelligence backgrounds; and the larger number with official backgrounds; and the continuing news-government social connections (Reston is having dinner with McNamara on June 14...)

Note: as of late June, 1971, the Executive had four efforts underway, or about to be underway, in fonnnection with Pentagon Papers: the prior restraints; 2) criminal prosecution of me (what was the process leading to this? Was there a grand jury? What was the internal debate? What triggered it? Why did the LA US Attorney refuse to sign an indictment?) 3) A Boston grand jury looking toward criminal indictments in the distribution of the Papers and publication, including the Times (and academics like Popkin; and Falk?) 4) The plumbers effort, to "neutralize" me (not what I was saying about, and might reveal, the period covered by the Pentagon Papers, but about the secret policy of the Nixon Administration: which they knew I knew in general, and thought mistakenly I knew in detail and could prove with documents).

See JFK's statement to the Times' publisher Orville Dryfoos, "I wish you had run everything on Cuba...I'm sorry you didn't tell it at thetime."

It wasn't press reporting that led to "the perfect failure" at the Bay of Pigs. Vietnam was The Sea of Pigs: and it wasn't press reporting or public opinion that kept them from victory there (nor would invasion of Cuba have ended up looking good, either in 1961 or 1962: secrecy on both sides wasn't what protected JFK from a catastrophe there! rather, secrecy about the covert operations, Mongoose, and the manipulation of public opinion that encouraged an invasion could have led to nuclear war... (even though it could be argued that the secrecy that led up to the blockade and then protected JFK's bluff led to a victory: he narrowly won his dangerous gamble. Thus, the possibility of secrecy encouraged an approach that had a high potential for disaster, even though it ended successfully for the US: though aiding the downfall of Khrushchev and the resultant arms race... and encouraged Rolling Thunder in Vietnam... (a victory with costly long-term consequences and dangers like the Six Day War)

The main dangers that the Government posed in its argument before Judge Gurfein, and later, was not potential military dangers (or intelligence: does Rudenstine contradict this?) but "possible diplomatic harm.

William Macomber, Deputy Under Secretary of State for

Administration testified that the PP had already caused considerable embarrassment to some American allies: Australia, for the circumstances under which Australians were [drafted! to be] sent to fight in Vietnam. Canadians, on failing to let their own people know of their efforts as US proxies in negotiations [sic] with North Vietnam {i.e., threats/ultimatums!]

Thus, diplomatic secrecy does permit the US government to:

--get a democratic ally to bypass its own democratic procedures to do things it shouldn't do, which its own people wouldn't permit, for us, which permit us to ignore our own Constitutional procedures, encourage us to take part in wars we shouldn't get in, make threats we shouldn't make, which our own people wouldn't permit if they knew all the facts, which don't work even to the benefit of our illegitimate and dangerous objectives...

Inability to get the Australians to "help us" in this way (giving the war a flavor of "more flags") and the Canadians to be a channel for our threats of escalation [not genuine or possibly hopeful overtures toward peace] would have been good for us, just like inability to project the Bay of Pigs as a covert operation...

Openness would have made it harder for us to get into and stay in The Sea of Pigs... (which we were encouraged to do by a sequence of imperfect failures, half-successes, short-term makeshifts...)

Macomber: "Governments must be able to deal with each other on a confidential basis, or they cannot deal at all. "I just don't see...how we can conduct diplomacy with this kind of business going on."

Depends on the nature of the dealings, their content, their relation to law and the domestic laws and opinion in their countries. These dealings, outrageous on both ends, no. Compare the supplying of funds for the contras by various countries to bypass the Congressional ban on US funding!

Ten years later, to his credit, Macomber, then president of the Met, "continues to believe that the Government should have brought the PP case, since it raised 'very serious and very close issues' [later is, perhaps, Rudenstine's point, though several justices did not agree on the closeness] that needed to be resolved in a court of law. However, he said in an interview that he now believes the case was 'probably decided properly.' His view: 'I think that, even though I've been a diplomat all my life and nothing is more important to me than the security of the United States, the First Amendment is, in another way, the security of the United States. You can't save something and take the heart out of it." 72

[Bravo. What is to be secured is, as much as anything else, our democracy; and our democracy is the foundation of our security.]

"There were those who thought that an aroused Congress would force President Nixon to get us out of Vietnam. And there were others who envisioned an immediate public uproar that would carry all before it. (The American people, as Tom Wicker later wrote, 'did not rise in anger to demand the end of the war, as Ellsberg in his most optimistic moments might have hoped.')" 72

True, this did not happen, either in Congress or in the public. But why not?

Note the dramatic effect of the announcement on July 15 of the Kissinger "secret" visit to China and the prospect of Nixon's visit to China. This stopped the sale of the Bantam Book, ended the PP on the nightly news, and, I believe, stopped publication in the papers (if it had not ended earlier). It created the impression for a matter of months, that the war was over: just as the failure to cancel the Soviet summit after the Haiphong mining and renewal of bombing, the next spring, cancelled out the apprehensions caused by the spring offensive and led again to the belief that the war would end, removing the war as a factor in the electoral campaign. (The belief in the spring, again, that it was not over had encouraged the nomination of McGovern; the Soviet summit removed this issue, though the prospects for any Democratic candidate had been blasted with Wallace's shooting on May 15).

What would have been the effects of the PP, over time, if there had been no surprise announcement, or any announcement, of the opening to China? (Of course, it was clear by the spring offensive, that this had not ended the war, that it did not indicate a deal on Vietnam or even an immediate lessening of Chinese and Soviet support for the DRV, as the offensive showed).

Especially if there had been, as I hoped, Senate hearings based on the PP. Was there no planning for these? Was the only planning in the Senate or House for hearings orchestrated by Nixon, against me and the Democrats?

Anyway, the second factor in damping any reaction to the PP was the failure of either the media or the Congress to investigate the Nixon policy on VN or to discover that it was, indeed, the same as that of his predecessors and concealed by the same sort of lying and secrecy.

Third, as Rosenthal pointed out last week on C-Span, the Supreme Court case and effort at prior restraint distracted all attention from the content of the Papers and the issue of the continuities in Vietnam Policy--which pointed to its persistence in the Nixon Administration. The issue became not at all, what has ,

hethe policy been and how has it been conducted, and what does that tell us, and what is the fact, about what it is now? But only: does the Administration have a case for prior restraint? With the focus on the Administration's case for secrecy, about the past, it was even restricted to the issue of prior restraint, not on the secrecy system in general and specifically whether I or the Times had broken a law in what we did, or whether there was any law sanctioning violations of the secrecy regulations, or whether there should be such a law providing criminal sanctions for such violations.

There never has been the latter debate, or resolution. Abrams strikingly omits any consideration of it, even though he mentions that the Government and others considered criminal prosecutions.

He mentions only once that there was a criminal prosecution against someone (me): in connection with describing how it got dismissed. Nothing about how it might have turned out, the issues in it, or what the implications would have been for the press and further cases if I had been convicted.

He avoids mention of this to the point of citing Charles Nesson and describing him only as "a Harvard Law School professor" without mentioning that he was my lawyer! (He had not up to that point mentioned me case).

Vance, in an interview with Abrams: Publication plainly had an effect on public opinion and public opinion had an effect on the duration of the war."

"Publication had direct, if utterly unpredictable, effects on the Nixon White House....it set ito a motion a crazyquilt series of events...the "plumbers." Assigned the task of gathering information for the purpose of discrediting Daniel Ellsberg...

Abrams, like Rudenstine and virtually everyone else, sees the reaction of the White House to the publication and to me as impulsive, emotional, erratic, "unpredictable, crazy": not, as it was, a coherent, reasonable, strongly impelled response to a reasonable fear of what I had yet to reveal about their ongoing policy. Why would they want to "discredit" me...if their policy was what they publicly said it was? Why did they have a problem with me? Because the public might force them to cut loose from Thieu?

The real point of the plumbers, anyway, was not to discredit me but to silence me, to shut me up,. to stop me from further revelations (or others) about their past, current and future threats of escalation and their actual demands and aims.

Other effects of publication: Friendly: "stiffened the spines of all journalists." Made the Post more willing to investigate and to

publish the reports on Watergate. Made the public less willing to accept Government denials on Watergate. More leaks (Cambodian bombing, bombing of NVN, India-Pakistan tilt). FOIA amendments to allow, for the first time, :judicial scrutiny of classification documents."

But Abrams, like all journalists and most lawyers, looks at the prior restraint cases and the Supreme Court hearing and ecision as "the" Pentagon Papers case, to the almost total exclusion of my case or the issue of criminal prosecution: which certainly has an almost equal potential for "a chilling effect on free speech"!

It was nothing other than the way my case ended that prevented such an effect! Even a total acquittal--which I now see as unlikely, given the attempt to bribe the judge, without the Watergate dimension of Dean's revelations--would not have precluded a further case on the distribution, a second crack.

Also, like everyone he ignores how the case might have come out if I had not decided to keep distributing the papers, or if I had been unable to do so (e.g., by being imprisoned, or enjoined, or byt not having enough copies! Pat...)

"In the PP case, during the period in whichh The Times was enjoined from publishing the documents, Daniel Ellsberg made available to almost 20 other newspapers portions of the Pentagon Papers. The Government brought actions for injunctive relief against three of them, but no action was taken against the others....Judge Roger Robb of the US Court of Appeals for the DC [inquired of counsel for the Government] whether it was 'asking us to ride herd on a swarm of bees.'" 78..."All the prior restraints issued i the Pentagon papers case failed to prevent Mr. Ellsberg from continuing his distribution." 82

This added to the drama, and probably did not endear me to the Times, or the Post. But how did it affect the Supreme Court decision?

It was not the case that "Once information is out, it is virtually impossible to stop its broader dissemination." 15 years later, Max Frankel says the same thing:

Actually, not one paper printed a page of the PP that they didn;t get from me (i.e., from people helping me, by my decision). None of these others who had access, either before June 13 or afterwards, risked criminal prosecution or contempt citations to continue the publication of the PP: only me (and all those antiwar individuals working with me). If I had stopped, the process would have stopped. If I had taken Marty Garbus' advice after the TRO on

the Times ((and perhaps, if Dunn Gifford had not urged me to overcome my hesitation about going beyond Sheehan and the Times): what would have happened in the Supreme Court, to the release of the Pentagon Papers beyond the first three days, and to prior restraint?

As a possible lesson from the episode, Abrams suggests one "that would not garner a single vote on the SC today. If prior restraints on publicaion are both useless and dangerous, why not toally remove them from the arsenal of government attorneys? Criminal prosecution could, if appropriate, be commenced acter publication; prior restraints before publication, oso rarely even attempted in our history, could be avoided."

Thanks a lot, Floyd! Criminal prosecutions have been even rare; only two in our history! What if there were a lot more: would that be so much better than prior restraint?

Earlier comment: "A majority of the Supreme Court not only left open the possibility of prior restraints in other cases but of criminal sanctions being imposed upon the press following publication of the Pentagon Papers themselves. [What about, prosecution of sources, Floyd?] While restrictions in advance of publication have historically--and correctly--been viewed as the worst possible intrusions on press freedoms, the visage of criminal prosecutions after publication was hardly one to encourage boldness among editors." 92-93.

What of chilling effects on sources (which did occur just with my prosecution; what would have been the effect of conviction, and a long prison sentence? (which not one official who has committed perjury before Congress has served. Would I have gotten a suspended sentence?)

Black's opinion, his last:

"The press was to serve the governed, not the governors. The Government's power to censor the press was abolished [sic] so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and iform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." [and to kill...]

How are government officials to inform the press, as whistleblowers, if they are confronted with the spectacle of actual prison sentences (which they already fear, in the absence of any cases except Morrison, and my unsuccessful prosecution. They already believe wrongly that they would clearly be violating the

law if they did...what so many of them do anyway on a small scale. Is there enough "leaking"?~ Should there be more, much much more, or less? Have there been a lot of truly damaging leaks, or any?

There will always be many and strong administrative sanctions against revelations forbidden by bosses. There will always be great excessive secrecy in bureaucracies and governments, and great "abuse" of it. A question is: Should government officials be able to threaten criminal sanctions for violations of their regulations and orders on secrecy?

Nearly everyone believes, uncritically, that this is the case and that it should and must be the case. Yet it has--prior to my case and Morrison's case--not been the case in the US. The effect has been much the same as if it had been the case, and yet if there had been some or many actual prosecutions there would undoubtedly have been a great deal less leaking than there has been.

(How does the actual practice of leaking differ in countries where there are Official Secrets Acts and prosecutions based on them? England, France, nearly everywhere? Note the case of my chemical weapons friend in Russia.)

Those who want less leaking therefore want an OSA, and lots of prosecutions. They don't want a First Amendment. What does the press think? Do they think the present ambiguity and uncertainty is just about right? Do they think the "contest" and forays on both sides are just right, optimal? How afraid are they of an OSA, or an effective one?

How much pressure should they be exerting (instead of none) for a true, radical reform of the secrecy system and its oversight?

(Note the Ortiz and Harbury cases, Torricelli, the demand for Guatemala documents, the printing by Weiner of classified documents in the News of the Week in Review! Did he break the law? Did his informant, who read the cables over the phone, and then apparently supplied them? Should this be left unclarified? If it was against the law, should this law be left standing or changed?

Does the press really think that the best system is one in which the leaker faces not only the danger of administrative sanctions but a prison sentence, not only a burden of proof on him or her to avoid administrative sanctions but a real prospect of prison, limited only by the difficulty in detecting the offender?

That's like saying that the way to minimize abortions while allowing for some in desperate circumstances where they are appropriate is to make them all illegal but rely on the impossibility of detecting all violations.

(Interesting parallel. "All leaks/abortions are bad, immoral, evil, criminal, but in some cases they may be a lesser evil; they

should all be banned, but in those cases where they are truly necessary a person will be willing to risk a possibility, which is not a certainty or high likelihood, of detection. If they are caught...they must pay the price, unless they can make effective use of a necessity defense. See also assisted suicide."

Is that really where the burden of proof should go? In favor of executive branch discretion, bureaucratic rules and practice?

A different approach: encourage more leaks, make them less dangerous and less illegitimate, by unequivocally decriminalizing them (as the First Amendment was always interpreted as having done, forbidding an OSA, prior to my case and the Morrison case, in the actual legal counsel's offices of the DOD, CIA, State and Justice, though this was not disclosed to employees holding clearances, who were instead deceived on the views of the lawyers.

(Who was it who just told me he had looked into this question in the government and gotten it right? As Scotton had done in Turkey.)

Likewise, institute appeals processes on classification; restraints on classification, requirements to justify it (see Frankel today)\

wholesale declassification; assault on the secrecy system; glasnost

(If I had the documents Ortiz is asking for...

Get the Pentagon Papers of the Nixon Administration; the tapes!

Glasnost on US policies in the Third World in the Cold War era: Central America, Chile, Indonesia, East Timor, Iran...and on nuclear policies, proliferation--aiming at decisive post-Cold War change in our use of instruments that cannot be justified to our own own public: terror, massacre, overthrow of democratic regimes...

I was not "turned off" by lying and secrecy (as Salisbury said: almost no writer on this subject, not Rudenstine, Unger, Salisbury, Abrams, was willing even to report what I said was my real motivation in risking life in prison: It was what the lies and secrecy concealed and perpetuated: the content and nature of our secret foreign and military policy, particularly in the Third World and in nuclear policy.

Secrecy in the first of these has encouraged an epidemic of torture, tyranny and massacre. Secrecy in the second has endangered human survival.

It is hard to feel sufficiently urgent about the threat that secrecy (and lying) poses to democracy unless you come to

appreciate what effective democracy is needed to and has the power to forestall. You can't know that unless past and present secrecy and lies are overthrown to the extent of permitting public understanding of what has secretly been carried on.

In my own case, the immediate impulse for my challenge was to stop the further and renewed secret escalation of the Vietnam War and avert the deaths of tens of thousands of Americans and hundreds of thousands of Vietnamese. (I was far from completely successful in this; secrecy and lies continued for four years, over 20,000 Americans died and hundreds of thousands of Vietnamese after I gave the PP to the Senate; but it could have been far, far worse. Indeed, I think it would have been, if Nixon had not taken a risk of impeachment and criminal prosecution in order to end the threat I posed to his secret policy and if he had not lost his gamble.